

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4021

**United States Court of Appeals
For the Second Circuit**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL
802, AMERICAN FEDERATION OF MUSICIANS, AFL-CIO,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

**BRIEF FOR ASSOCIATED MUSICIANS OF GREATER
NEW YORK, LOCAL 802, AMERICAN FEDERATION
OF MUSICIANS, AFL-CIO**

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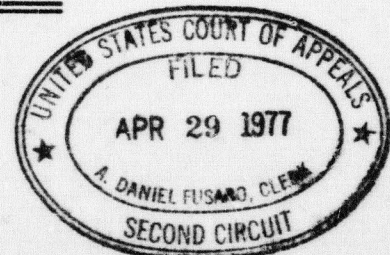


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ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
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BRIEF ON BEHALF OF RESPONDENT

ISSUES PRESENTED

1. Whether the Board's finding that Local 802 violated Section 8(e) of the Act by maintaining and enforcing an unwritten implied agreement with Vogue Restaurant, Inc. and Huntington Town House, Inc. restricting performance by musicians unless members of

Local 802 is supported by substantial or credible evidence.

2. Whether the Board's finding that Local 802 violated Section 8(b)(4)(ii)(B) of the Act by seeking to coerce the Queens Center Merchants Association, Inc. to cease doing business with a Bob Chevy band is supported by substantial or credible evidence.

3. Whether the Board's order is overbroad and an improper remedy in this case.

STATEMENT OF THE CASE

This case involves the application of the National Labor Relations Board (hereinafter the "Board"), pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. 151, et seq.) (hereinafter the "Act"), for enforcement of its June 30, 1976 order issued against Associated Musicians of Greater New York, Local 802, American Federation of Musicians, AFL-CIO (hereinafter "Local 802" or the "Union"). The Board's decision and order, reported at 225 NLRB No. 74 (A. 2-40), ^{1/} found that Local 802 had violated Sections 8(b)(4)(ii)(B) and 8(e) of the Act. Local 802 contends the Board's decision is erroneous and not supported by substantial or credible evidence and submits that, in any event, the Board's order is overboard and improper.

^{1/} References to page numbers designated "A." are to the printed Appendix. References to page numbers designated "Tr." are to the transcript of the Board's proceedings filed with the Court. References preceding a semicolon are to the Board's findings; those following are to the alleged supporting evidence.

SUMMARY OF ARGUMENT

1. The Board's finding that Local 802 violated Section 8(e) of the Act by maintaining and enforcing an unwritten implied agreement with Vogue Restaurant, Inc. and Huntington Town House, Inc. restricting performance by musicians unless members of Local 802 is not supported by substantial or credible evidence.

2. The Board's finding that Local 802 violated Section 8(b)(4)(ii)(B) of the Act by seeking to coerce the Queens Center Merchants Association, Inc. to cease doing business with a Bob Chevy band is not supported by substantial or credible evidence.

3. The Board's order is overbroad and an improper remedy in this case.

ARGUMENT

I. The Board's Finding That Local 802 Violated Section 8(e) of the Act by Maintaining And Enforcing An Unwritten Implied Agreement With Huntington Town House, Inc. Restricting Performance By Musicians Unless Members of Local 802 Is Not Supported By Substantial Credible Evidence

A. Factual Background

On July 28, 1974 the wedding reception of Mr. & Mrs. Dominic Mouro was held at the Huntington Town House, Inc. (hereinafter the "Town House"), a catering establishment located in Huntington, New York. Music for the affair was provided by the Del Castile Orchestras, pursuant to a contract between the Mouro's and orchestra leader William Del A'Quilla, a/k/a Del Castile (hereinafter "Del Castile") (Tr. 117). Performing in the orchestra along with Del Castile were, among others, Mel Fields and Chris Orlando (Tr. 118).

B. The Conversation with Messina

The entire case rests upon one alleged utterance on July 28, 1974, when at approximately 10:00 p.m., Local 802 business agent Joe Messina entered the room and asked Fields, whom he thought was the leader (Tr. 119), whether a contract for this job had been filed with the Union. Upon being advised that they were a Del Castile orchestra, were not members of the Union, and that no such contract had been filed (Tr. 119-120), Messina left (Tr. 269-271).

According to Del Castile (Tr. 120), Fields (Tr. 18-19), and Orlando (Tr. 28-29), Messina advised them that they were not allowed to play at the Town House unless they were members of Local 802, that he would let them go since they had thirty (30) days to join the Union, but that if they appeared there again and were not members of the Union, there would be "trouble" (Tr. 18). According to them, Del Castile specifically asked Messina, at least twice, whether there existed an agreement between the Union and the Town House under which only Union musicians were permitted to perform at private parties sponsored there, and each time Messina allegedly answered in the affirmative (Tr. 18, 29, 120).

According to Messina, after being advised that the band was a Del Castile orchestra, he stated simply, "fine, have a nice evening," and then started to walk out (Tr. 269-70) when someone on the bandstand said, "you guys never give up," and Messina replied that he had a job to do (Tr. 270). The entire conversation did not last more than a few minutes (Tr. 270). Messina denies ever saying that the Town House was a Union house or that everyone would have to join Local 802 if they wished to work there again, or threatening trouble, etc. (Tr. 271-2). He further strenuously denies telling Del Castile and the others that there was an agreement between the Union and the Town House that only Union musicians could perform there (Tr. 272).

Neil Klein, a musician performing in another room at the Town House, who overheard the conversation after following Messina into the room, corroborated his testimony that the conversation lasted only a few minutes (Tr. 309 - 310), and also his version of what was said.

C. The Conversation with Ciafardini

Fields, Orlando, and Castile testified that immediately following the conversation with Messina, another conversation took place with Town House banquet manager Tony Ciafardini. According to them, Del Castile related to Ciafardini what had just transpired with Messina and then specifically asked him, at least three times, whether in fact there was an agreement between the Town House and the Union whereunder only Union musicians could work at the Town House. All three testified that Ciafardini unequivocally stated that such an agreement did exist (Tr. 21-22, 30, 122-123).

Ciafardini, who is, after all, part of management and certainly not Union-oriented, denied making any such statements (Tr. 287), and testified that no such agreement existed (Tr. 287). He further testified that the Town House sells rooms and food (Tr. 288), that the Town House has nothing to do with the patron's arrangements for musical services (Tr. 293), that patrons arrange to get their own band if music is desired (Tr. 288-303), that they never tell patrons who inquire about music that there exists any requirement that Union musicians be used (Tr. 290), and that the Town House itself

does not ever recommend musicians (Tr. 290). The written agreement between the Town House and its patrons makes no reference to musical services or any restrictions with regard thereto (Tr. 304).

It was undisputed that the Del Castile band continued to play without interruption following the conversations with Messina and Ciafardini. Is there not a ring of truth to Ciafardini's testimony that then the Del Castile group asked about playing, he, Ciafardini, responded "...am I stopping you from playing? They said no. I said well then play. I said I didn't hire you, your host hired you, so you do whatever your host wants to do. You want to play, you play" (Tr. 301). There was no evidence that the Mouros were even aware of these conversations, as they had occurred during regular breaks in the music.

D. The Practice of Non-Union Bands
Performing at the Town House

Musicians Klein and Richard Leiter, both of whom frequently performed at the Town House, testified that during the period in question they have regularly seen non-Union bands perform there (Tr. 311, 321). Klein testified that he had complained to Messina about this situation, but was advised by him that there was nothing he could do about it (Tr. 312).

Messina testified that on each of his frequent visits to the Town House during that period, he always saw at least two (2) non-Union bands performing there (Tr. 245). The engagement reports pre-

pared by Messina confirms this, as do his conversations with Town House owners Maggi and Ferrara, in which Messina complained about the non-Union bands and they replied that they were only interested in booking the rooms (Tr. 263).

E. The Absence of Substantial or Credible Evidence to Support the Board's Finding

The gravamen of the Board's finding is that the Town House and the Union have maintained an agreement under which only Union musicians are permitted to perform at the Town House (Tr. 12).

However, the undisputed testimony of Messina (Tr. 248-262), Klein (Tr. 311-312), and Leiter (Tr. 321-322), as well as the documentary evidence, clearly established that during the period in question non-Union bands, including Del Castile groups, were performing at the Town House every single weekend (Tr. 260). In fact, Fields stated that he had previously performed at the Town House (Tr. 25). The undisputed testimony also established that when this fact was brought to the attention of the owners of the Town House, they expressed complete disinterest and indicated that their only concern was "selling the rooms" (Tr. 263), and that the Town House had no financial interest in which band was selected by its patron, or whether it was Union or non-Union. In fact, one witness, Jerry Rainbow, testified without contradiction or rebuttal that he worked the Town House seventy-five (75) times during the preceding year and that non-Union bands were always playing in one

or more of the rooms (Tr. 328-329). Rainbow acknowledged that he knew Del Castile as they had previously worked a few jobs together, and he had seen Del Castile work at the Town House during the preceding year (Tr. 328).

No interruption occurred during the Mouro wedding and the Board does not allege interruption by the Union or the Town House of any of the many other affairs at which non-Union bands performed.

Who is Del Castile? He is an orchestra leader employer and a member of the National Association of Orchestra Leaders (hereinafter "NAOL"). That organization, of which Peterson (the charging party) is an officer (Tr. 137) and to whom Del Castile refers as my "esteemed colleague" because he knows Peterson has "vast knowledge in NLRB matters" (Tr. 128), exists primarily for the purpose of filing unfair labor practice charges against the American Federation of Musicians and its affiliated locals, including Local 802 (Tr. 137-139). Del Castile is also the "administrator" of the Allied Musicians Union (hereinafter "AMU"), an organization which purports to represent employees in their dealings with employers. The AMU operates out of Del Castile's home, and most of the AMU's correspondence is sent out over his signature as "administrator" (Tr. 139-143). The "president" of the AMU is one of Del Castile's regular employees, and relies upon him for work (Tr. 139), as do the other members of Del Castile's band who corroborated his testimony (Tr. 143-144). Any testimony by Del Castile or his employees on the

issues involved must be, to put it mildly, inherently suspect.

Klein, on the other hand, who corroborated Messina's version of the conversation, has no similar self-interest in this proceeding; hence there exists no basis for impeaching his credibility. It is often the little things, as herein, which determine the extent of credibility to be accorded a witness's testimony. What is more natural than for Klein, a member of Local 802, but never an officer or even a steward (Tr. 306-307), who worked two (2) or three (3) jobs a week at the Town House (Tr. 307), who worked there on the night in question - July 18, 1974 - (Tr. 307), to remember that night because of an incident which occurred. The incident? At about 7:30 that evening Klein stopped Del Castile from attempting to convert Klein's organist to Del Castile's AMU, and said to Del Castile, "stop bothering my man" (Tr. 308-309).

Later he saw Local 802's business agent, Messina, and said, "what goes on with this other union? No matter where you go, where you walk, they're walking around handing out their paraphernalia to musicians to join their new union" (Tr. 309, 312, 314, 316). Messina said, "Can't stop it. What can you do? It's a free enterprise" (Tr. 309, 312). Klein walked with Messina to the Brentwood Room next door and heard musicians tell Messina it was a Del Castile band. Messina said, "Ok," turned around and started to walk out. Someone said, "you never give up, do you," and Messina said he was "just doing his job" (Tr. 309-310, 319).

Moreover, the testimony of the Board's witnesses regarding that conversation is just not credible. All of them testified that Del Castile, in the presence of the two (2) others, specifically asked both Messina and Ciafardini, each at least twice, whether an unlawful agreement existed between the Town House and the Union. According to their testimony, both admitted the existence of such an agreement. In view of the fact that both Messina and Ciafardini were aware of the prior Board decision involving the Town House, Associated Musicians of Greater New York, Local 802, American Federation of Musicians, AFL-CIO (Huntington Town House, Inc.), 203 NLRB No. 163, 83 LRRM 1636 (1973), it is utterly inconceivable that they would have made such admissions, even if, arguendo, such an agreement did exist. Rather, it is much more likely, as both of them testified, that they made no such statement and that in fact no such agreement exist.

The fact that there was no interruption in the wedding affair on the night of these conversations further supports Messina's version of what was said. Associated Musicians of Greater New York, Local 802, American Federation of Musicians, AFL-CIO, (Dante Caterers, Inc.), 212 NLRB No. 79, 86 LRRM 1680, 1682 (1974). Nor does the Board allege any interruption by the Union or the Town House of any of the other affairs at which non-Union bands perform during the period in question.

It is abundantly clear that in relying on only this single incident, regarding which the testimony is sharply divergent, the

Board has completely failed to meet its burden of proof of establishing the existence of the alleged unwritten implied agreement in violation of Section 8(e) of the Act.

By way of contrast, the testimony of the charging party's witnesses indicates identical word for word preparation and verbatim memorization of self-serving uncorroborated statements. Space does not permit a verbatim side by side columnar comparison, but such a comparison would only demonstrate what is evident from reviewing one or two instances. The testimony of Del Castile (Tr. 120) and that of his supporting witnesses, Fields (Tr. 18-19), and Orlando (Tr. 28-29) present identical word-for word versions of what supposedly occurred when Messina walked into the room. Similarly, compare the identical word-for-word testimony regarding the Ciafardini conversation by Del Castile (Tr. 122) with that of Orlando (Tr. 32) and Fields (Tr. 22).

Obviously, these witnesses had good tutelage, if not actual preparation, under Peterson, the charging party in over fifty (50) proceedings before the Board in the last two (2) years alone (Tr. 163), including other cases against Local 802 (Tr. 162-163).

Yet the Administrative Law Judge (hereinafter the "ALJ") simply accepts the testimony of Del Castile, Fields and Orlando that an agreement existed whereby only Local 802 members could perform at the Town House (A. 15). This finding flies in the face of the uncontradicted testimony of many witnesses that non-Union

bands were always performing at the Town House. No matter, observed the ALJ, it was an unlawful agreement, and its enforcement, even though not "universal" was "discriminatory," and it is therefore violative of Section 8(e) as a "hot cargo" agreement (A. 15).

The apparent aim of the ALJ to discredit Messina of Local 802 and Ciafardini of the Town House does not in any way discredit their denials of the existence of any understanding or agreement.

And, in support of such alleged implied agreement, we have the statements of the charging party and his associates, all repeating in parrot-like manner a story of admissions made by the Union and the Town House. In substance, then, the rehearsed testimony of Del Castile and his associates must be viewed as biased and self-interested. It must be noted that such testimony contains phrases that a lecturer in labor law might use, not those used by a musician. Yet the ALJ gives credence and bases his entire finding on such testimony, and the Board reiterates such testimony by the charging party and his witnesses as though these were established facts.

The alleged agreement to limit employment of musicians at the Town House to members of Local 802 is admittedly unwritten and therefore, if it exists at all, must be implied. To be implied, the existence of such understanding obviously must be founded upon the occurrence of some act or deed. Even if we assume the possibility that perhaps some understanding existed, such assumption is not borne out by the record. No acts were taken in furtherance of or

to demonstrate the existance of such alleged understanding. Was the Del Castile Orchestra stopped? No. Had Del Castile played at the Town House previously without interruption? Yes. Were there other non-Union bands playing on every weekend for at least the past two (2) years? Yes. Were any non-Union bands ever stopped? No. Were there other non-Union bands performing that very night? Yes. Thus, we are left with only a few words alleged and disputed to have been uttered on one occasion.

In essence then, there not only is no substantial evidence to support the charge, but there is no credible evidence. In fact, there is no evidence on which to base a finding or on which to establish the existence of any agreement or understanding.

II. The Board's Finding That Local 802 Violated
Section 8(e) Of The Act By Maintaining And
Enforcing An Unwritten Implied Agreement With
Vogue Restaurant, Inc. Restricting Performance
By Musicians Unless Members Of Local 802 Is
Not Supported By Substantial Or Credible Evidence

A. Factual Background

Through Carnegie Talent Agency (hereinafter "Carnegie"), a talent agency, Vogue booked a musical duo, Jeffrey Tillman and Helier Felipe, known professionally as Jeff and Phil, to perform in its lounge beginning March 12, 1975. Neither Tillman or Felipe were members of the Union (Tr. 34, et seq.).

B. The Conversations Between Tillman, Felipe,
Cole and Cohen

When visited by Ray Cole, Local 802 business agent, Tillman and Felipe told him that they were members of the AMU, not Local 802 (Tr. 80), and that it was their understanding that they did not have to join the Union to play at Vogue (Tr. 80-81). Cole agreed (Tr. 81). Although Cole urged them to join the Union, he never told Tillman and Felipe they couldn't play at Vogue if they didn't join Local 802 (Tr. 74, 85), and both admitted that Cole never said there was any agreement with Vogue under which only Union members could perform (Tr. 85).

Sy Cohen, one of the owners of Vogue, testified that while he thought Tillman and Felipe were a good duo, he wanted to bring back Vogue's regular band which had been there before (Tr. 204). Cohen stated that there was no contract between Vogue and the duo

for a longer engagement and that they were originally engaged only for a two-week stint. He explained that in the restaurant and lounge business it was common to frequently change entertainment to provide variety for the customers, and that he had received a number of requests from his patrons to bring back a prior group (Tr. 211, Tr. 234-5).

Felipe testified that after he and Tillman had been performing at Vogue for a few days, Cohen told them that Vogue was a Union house, and they replied that they understood that under the law they were not required to join the Union. According to the testimony of both Felipe and Tillman, Cohen agreed (Tr. 79).

According to Cohen, he told Tillman and Felipe that he would prefer their belonging to the Union (Tr. 208), and explained that this was what he meant by the phrase "Union house" (Tr. 208). Cohen also testified that non-Union bands had always performed at Vogue, and that they continued to do so after Tillman and Felipe left (Tr. 209) and that, in fact, at that very same moment, two non-Union groups were playing at Vogue (Tr. 206). Indeed, Cohen further testified that the only threat of picketing came from Del Castile (Tr. 200). Even Del Castile admits that Cohen never told him that he had an agreement with the Union (Tr. 150). This corroborates Cohen's testimony to the same effect (Tr. 85). It should be noted that Cohen appeared under subpoena (Tr. 196).

C. The Conversation Between Cohen and Klein

Arnold Klein, president of Carnegie, testified that he contacted Cohen to find out why Cohen had brought back an old group

after the two (2) week stint by Tillman and Felipe (Tr. 39). Here too, as in the Town House case, Klein's testimony of what Cohen said is almost word-for-word identical with Tillman's and Felipe's statements. Cohen's testimony of the substance of his conversation with Klein disputes Klein's recitation and therefore Klein's testimony cannot be considered as corroborating that of Tillman and Felipe.

D. The Absence of Substantial or Credible Evidence to Support the Board's Findings

Prior criticism of the Town House case is equally applicable to this case which the ALJ refers to as "The Vogue Restaurant Incident." There was one visit made to Vogue by the Union's business agent, but Cohen, the owner; Tillman and Felipe, the musical duo; and Cole, the Union business agent, all testified that no threats were made, that there was no agreement restricting employment to Union members, that non-Union bands always played at Vogue, that bands were always regularly changed for business reasons, and that the two (2) week stint of Tillman and Felipe had been completed.

More importantly, it is submitted that except for the one conversation between Cole, Cohen and the duo, not one word of the voluminous testimony of the many witnesses, each with motives and their own business or personal axes to grind, is admissible. The testimony is the rankest hearsay once, twice and thrice removed. It is not even based on admissions by a party, for Cohen of Vogue was not a party, the proceedings having been dropped as against Vogue the day before the hearings commenced.

Despite its lack of relevance and questionable probity, the ALJ permitted such extensive testimony that one can easily lose sight of the unlawful labor practice alleged. Klein testified for twenty (20) pages (Tr. 34-53), Tillman and Felipe for twenty-five (25) pages (Tr. 62-86), Peterson for eleven (11) pages (Tr. 153-164), and the Cohens for forty-five (45) pages (Tr. 197-242). Additionally, the ALJ discussed the testimony, most of which is hearsay, for some two thousand five hundred (2,500) words.

Notwithstanding these facts, what the Cohens, Tillman and Felipe, the two (2) officials of the charging party, and the two (2) representatives of Carnegie said to each other, and what each one is said to have said the others said, with all of the endless repetitive irrelevancies of these statements, is treated as hard evidence by the ALJ, and stated as fact by the Board in its Statement of the case and findings.

Except for uncorroborated conclusions, flatly denied or otherwise discredited, there is no probative or credible evidence of a "hot cargo" agreement. There is no evidence that only Union bands could play at Vogue. In fact, non-Union bands played there before and after the "Incident." There was no evidence of actual picketing. Local 802 never threatened picketing. Rather, according to Cohen, the charging party (not the Union) threatened picketing. There was no evidence that the Union caused any discharge (except for some hearsay, disputed testimony, by biased, interested persons). This charge is based upon one disputed conversation in which Cohen, the

owner-employer, appearing under subpoena, denies any agreement with the Union and explains the reason for concluding the employment of Tillman and Felipe at the end of their contractual engagement.

It seems incredible that substance is given to the charge made by the charging party, or that the testimony in this Vogue case can stand on its own. Granted that Rule 801 et seq. of the Federal Rules of Evidence, "Hearsay" do not apply to administrative procedures. Notwithstanding, the philosophy behind the long-established rules against hearsay testimony should place some restraint upon the acceptance of such testimony under the conduct prescribed for administrative procedures in 5 USC 556(d). Even there, evidence must not only be relevant and material, but "reliable, probative, and substantial evidence." It is not a matter of a court believing it would have arrived at a different conclusion in conflicting testimony, but rather that all this hearsay is not only not reliable or probative, but as stated in Universal Camera Corp. v. NLRB, 340 U.S. 474, 27 LRRM 2373 (S. Ct. 1951), cannot possibly constitute substantial evidence when viewed in the light of the record in its entirety.

III. The Board's Finding That Local 802 Violated Section 8(b)(4)(ii)(B) Of The Act By Seeking To Coerce The Queens Center Merchants Association, Inc. To Cease Doing Business With A Bob Chevy Band Is Not Supported By Substantial Or Credible Evidence

A. Factual Background

The Queens Center Merchants Association, Inc., (hereinafter the "Association"), is a non-profit corporation which exists for the purpose of promoting the business of its membership, which is comprised of a few large retail establishments and many smaller ones, all doing business in an enclosed shopping mall (hereinafter the Mall") in Queens having a single common entrance.

In the Town House and Vogue cases, the charges are based on disputed words allegedly uttered by Local 802's business agents, each on one occasion, as to improper agreements with management, words that are completely belied by all the undisputed facts.

By contrast, the entire case rests on a single telephone call (Tr. 56) between a Union business agent, Al Brown, and an officious woman, Yolanda Goldstein, the advertising and promotional director of the Association (Tr. 53).

Goldstein had contracted with Robert Ciavolino, a/k/a Bob Chevy (hereinafter "Chevy") for his orchestra to perform a series of four (4) concerts at the Mall, beginning July 9, 1974 (Tr. 53).

B. The Conversation Between Goldstein
and Brown

On the day of the first concert, Brown, a business agent in charge of Local 802's Single Engagement Department for forty (40) years (Tr. 167) (there are approximately fifty thousand (50,000) single engagements a year (Tr. 90)), telephoned Goldstein regarding the concert. Brown inquired as to whether a Chevy orchestra would be performing at the Mall that night, and she replied that it would (Tr. 56).

According to Goldstein, Brown asked if there were going to be Union musicians performing in the orchestra and she answered that she didn't know or care (Tr. 57), and that after Brown asked what her contract with Chevy called for and she refused to tell him, he said that if the musicians were non-Union he would picket out in front of the Mall (Tr. 57).

Brown testified that the Union had always experienced difficulty in its dealings with Chevy as an employer of musicians (Tr. 172). At the time of these events and for a number of years prior thereto, Chevy had been a party to a collective bargaining agreement with the Union (Tr. 169). According to Brown, however, Chevy had never complied with its terms regarding the filing of notices of engagements, the payment of his employees of the required minimum wage scales, or the payment of pension or welfare contributions on their behalf (Tr. 172). In fact, Chevy acknowledged that a

lawsuit has been commenced against him to recover fringe benefit contributions owed by him on behalf of his employees (Tr. 101). Interestingly enough, he also admitted that Brown made no threats of picketing or threats of any kind (Tr. 103).

Brown explained that the purpose of the notices of engagements (or contracts) is to advise the Union of the location of the engagement and the names of the musicians who would be performing there. The delegates of the Union are then able to visit the job on the night of the performance to insure that the musicians are receiving the minimum working conditions provided in the Agreement. In addition, the delegates also check after the performance has taken place to verify that the proper wage and fringe benefit payments have been made by the employer (Tr. 168). Brown also testified that his telephone call to Goldstein was prompted by the fact that the Union had not received Chevy's notice of engagement report for the job, and that he wanted to make sure a Chevy orchestra was still scheduled to appear (Tr. 172).

According to Brown, after he asked Goldstein whether she had a contract with Chevy, she asked him what the Union would do if she had engaged a non-Union band. Brown testified that he advised her that if she used a non-Union band, they would "advertise by pickets that (the) band is non-Union" (Tr. 173). Such picketing would be entirely legal under Section 8(b)(7)(c) of the Act. Brown vigorously denied that he ever threatened to picket

the stores in the Mall (Tr. 173) and stated that he clearly conveyed to Goldstein his intention to picket only the particular band involved (Tr. 173). Brown further stated that there was no discussion as to the place of the picketing, and that, in any event, the entire conversation was hypothetical because he knew it was Chevy's band which was performing and thus there would be no reason to picket (Tr. 175, 189).

On the night of the performance, representatives of the Union appeared at the Mall. Brown explained that the reason for there being more than one delegate was the likelihood that any one of them would not know all the members of the band and the certainty that Chevy would not cooperate in their identification (Tr. 179).

C. The Absence of Substantial or
Credible Evidence to Support the
Board's Finding

The concert of July 9, 1974 went on without interruption. There was no evidence offered of picketing of any kind at that or any of the three (3) other concerts, nor was any evidence offered of any attempt to stop or interfere with any of the concerts.

In fact, since Chevy was under contract with the Union at the time of this event, it is clear that there was no desire to prohibit the Association or any other person from engaging his services. On the contrary, when Chevy orchestras performed, employment was created for Union members. What was of concern to the

Union, however, was ensuring that the musicians received proper conditions, as well as the specified wages and fringe benefit payments. It was this concern which motivated Brown's call.

It takes the ALJ two thousand (2,000) or so words to summarize, analyze and conclude his findings and opinion in this case involving a brief telephone conversation, the nature of which is disputed, and where nothing happened, no one was laid off, no one was fired, no picket lines were manned, no job or performance interference occasioned, and no threats made.

While considerable latitude should be, and is, afforded in all administrative hearings, it is submitted that there are sound reasons for rules concerning hearsay testimony, and the lines should be drawn somewhere if there is to be justice. A typical illustration, the admission of testimony by Chevy of what his secretary, Spinelli, told him Goldstein told her that Brown had said (Tr. 88-89). Also, the ALJ's consistently basing the admission of hearsay on the ground that the inadmissible testimony is just for background (e.g., Tr. 89, 107).

The admission of the hearsay testimony even though hotly controverted, is that by its endless repetition it appears to lend support to the alleged threat to picket. However, such testimony does not corroborate, for example, what Brown said to Goldstein, or what Chevy said Spinelli told him Goldstein said Brown had told her (Tr. 106-107). That such testimony should never have been admitted

is evidenced by Spinelli's admission that when she called Brown, he never threatened picketing (Tr. 114).

There has been no evidence adduced that the Union threatened the Association with picketing of its member stores if it engaged Chevy or other orchestra leaders who were not Local 802 members. A single telephone conversation is advanced by the Board in support of its position. Yet, it is submitted, Brown's version of the conversation is credible in view of the history of recurrent problems between Local 802 and Chevy. Inasmuch as Chevy was under a collective bargaining agreement, it would make no sense for Brown to threaten the Association with the object of forcing it to cease doing business with Chevy. After all, Chevy employed musician members of the Union whose dues paid Brown's salary. Brown's testimony clearly states that the purpose of his telephone call was to find out if Chevy would be there and the Union's desire to ensure that Chevy complied with the terms of the contract. Brown's further testimony that he would have no reason to ask the Union membership status of the Chevy orchestra is also credible. In short, in the absence of a single act to support the charge alleged, Brown's remarks constitute nothing more than a statement of intention to engage in legal picketing under the second provision of Section 8(b)(7)(c) of the Act.

IV. The Board's Application For
Enforcement of Its June 30, 1976
Order Should Be Denied

A. Precedent Requires Denial of the
Board's Order where the Adminis-
trative Law Judge Relied upon
Controverted Self-serving, Conclu-
sory, and Uncorroborated Hearsay
Testimony

It is axiomatic that the Court is not precluded from independently determining what weight certain testimony which the ALJ finds credible should be given when evaluating evidence on the record as a whole. The union contends that the evidence adduced by the Board in support of its order not subject to the hearsay exception is not substantial, credible, or of probative value. The Union further contends that a review of the testimony taken by the Board in its entirety furnishes evidence opposed to the Board's findings.

It is also axiomatic that the Board's and the ALJ's findings as to credibility of witnesses need not be accepted if implausible or unreasonable. The evidence underpinning the Board's order was patently self-serving, uncorroborated testimony conclusory in nature. Such testimony was strongly contradicted by witnesses for Local 802 and by representatives of the Town House and Vogue testifying under subpoena. Flatly denied and controverted hearsay testimony must, it is submitted, be considered discredited and cannot be relied upon to support a Board order where no acts have been alleged or proved.

The denial of enforcement of the Board's order because of the Board's failure to present substantial or credible evidence in support of its order is in accord with precedent in this and other circuits. See, Universal Camera Corp. v. NLRB, 340 U.S. 474 (S. Ct. 1951), 27 LRRM 2373 (1951); Schneider, Lorenz Co., Inc. v. NLRB, n.o.r. (2d Cir. 1975), 89 LRRM 2235 (1975); Portable Electric Tools, Inc. v. NLRB, 309 F.2d 423 (7th Cir. 1962), 51 LRRM 2331 (1972); Arnold Graphic Industries, Inc. v. NLRB, n.o.r. (6th Cir. 1974), 87 LRRM 2753 (1974); Dawn v. NLRB, n.o.r. (6th Cir. 1974) 86 LRRM 2817 (1974); Winn-Dixie Stores, Inc., 448 F.2d 8 (4th Cir. 1971), 78 LRRM 2375 (1971); Smoky Mountain Stages, Inc., 447 F.2d 925 (4th Cir. 1971), 78 LRRM 2217 (1971); Barberton Plastics Products, Inc., 354 F.2d 66 (6th Cir. 1965), 61 LRRM 2049 (1965); NLRB v. Mt. Vernon Telephone Corp., 352 F.2d 977 (6th Cir. 1965), 60 LRRM 2505 (1965); NLRB v. Southern Materials Co., Inc. 345 F.2d 240 (4th Cir. 1965), 59 LRRM 2220 (1965); NLRB v. Walton Mfg. Co., 322 F.2d 187 (5th Cir. 1963), 54 LRRM 2118 (1963); NLRB v. Florida Steel Corp., 508 F.2d 931 (5th Cir. 1962), 51 LRRM 2355 (1962); NLRB v. Turner Construction Co., 227 F.2d 498 (6th Cir. 1955), 37 LRRM 2175 (1955); NLRB v. Coats & Clark, Inc., 231 F.2d 567 (5th Cir. 1956), 37 LRRM 2802 (1956); and NLRB v. Cleveland Trust Co., 214 F.2d 95 (6th Cir. 1954), 34 LRRM 2224 (1954); Payless Cashway Lumber Store of South St. Paul, Inc., 508 F.2d 24 (8th Cir. 1974), 88 LRRM 2067 (1974).

B. The Board's and the ALJ's
Procedural Actions Prejudiced
the Union and the Entire
Proceedings

The Board's and the ALJ's procedural actions without doubt prejudiced the Union and the entire proceedings.

The consolidation by administrative fact of the three (3) itself was highly prejudicial. No contest of the consolidation could be made by Local 802. No common questions of law and fact were present which required the consolidation. Joint trials would have been less prejudicial but Local 802 would still have been prejudiced. None of the three (3) cases can stand on its own. Therefore, under the guise of administrative short cuts, the Board sought to consolidate three (3) seemingly untenable cases in an attempt to sway opinion by creating the appearance of a pattern of conduct where none exists and where none was ever established. Indeed, all that appears in the record is the fact of the consolidation itself (Tr. 3).

Similarly, the stipulations settling with Town House and Vogue, without notice to Local 802, on the Friday preceding the commencement of the within hearing on Monday was prejudicial. So, too, was the furnishing of copies of the stipulation only at the hearing. Weren't Town House and Vogue essential and necessary parties? Was Local 802 given an opportunity to object and have a hearing on its objections to the settlements with Town House and Vogue?

Further prejudice resulted from the conduct of the hearing itself. The hearing opened with the citation of and request by the Board that judicial notice be taken of the former decision of the Board in a prior Town House case, to wit: 203 NLRB No. 163 (Tr. 5), and the ALJ closed his findings on the present Town House case with a similar reference (A. 14). It was as though a criminal's past record were permitted into a trial to influence the jury.

Also, the rules of evidence were applied inconsistently granted that strict rules of evidence should not apply to administrative hearings; nevertheless, the ALJ should be consistent and not admit hearsay evidence twice and three times removed where offered by the Board "by way of background," yet be alert to exclude hearsay if offered by Local 802 (e.g., Tr. 88-89, 107).

Most annoying and prejudicial was the habit of developing a sudden impairment of hearing both by the ALJ (e.g., Tr. 42, 172-173), and the Board's counsel (e.g., Tr. 173, 187, 208) whenever an answer is deemed by them or appeared to be unfavorable to the Union. Saying, "I'm sorry. I couldn't hear you" (e.g., Tr. 42) is a trick which brings to mind the English actor, Robert Morley, saying on his trip to England, "Cheap, Cheap."

In view of all of the foregoing, the Board's application for enforcement of its order should be denied.

V. CONCLUSION

In the Southwest of the United States is a "community" called Old Tucson. At first glance, it has all the appearance of a western town of the 1880's, complete with saloons, banks, hotels, cafes, barns, houses, hitching posts, etc. Suddenly one realizes that these are only fronts, supported by angular beams in the rear, and that if one were to walk through any front door, one would again be out in the desert. The set is, of course, utilized for western films and as a tourist attraction. If only one "structure" stood by itself, its facade, the only wall, would be obvious, but put together with others, the realism is tremendous.

Similarly in the present situation, three facades have been arranged to give the illusion of a reality which does not exist. The trial herein was a charade, with an ALJ whose chief qualification would seem to be inexperience whose rulings are questionable, and whose thinly veiled bias would not for a moment be tolerated in this Court. Add to this a Board attorney whose conduct, actions and words bespeak a prosecutor determined to obtain a conviction at all costs, regardless of truth, honesty and merit. Compound this with prosecutor's witnesses who are all members of a rival organization determined to destroy Local 802, persons who never speak to anyone on the telephone unless their associates are allegedly listen-

ing in, who never speak to a Union man unless several witnesses are claimed to be present, and all of whose voluminous testimony, placed side by side, is for too well-rehearsed, too parrot-like, altogether too mechanical to be given credence.

Out of fifty thousand (50,000) single engagements per year, the NAOL has dredged up from among its members three situations in which not a single act can be established to support the charge. None of these situations involve a disinterested musician, one who is not a member of the Union or NAOL who was refused employment, or whose engagement was terminated. It is ironic that the twenty-five thousand (25,000) member Local 802 is compelled to defend itself by citing the number of non-Union bands playing constantly at the Town House and Vogue.

There is no pattern to misconduct by Local 802 established, nor of violations of prior Board orders or court decisions. A few isolated utterances of words, even if believed, are being utilized to pervert the fundamental philosophy of the Act forcing Unions to destroy themselves rather than to organize and to maintain strength for their members. This is what the Board is effectively determining in requiring the Union, on the basis of hearsay, not of acts, to notify all catering establishments in the New York and Long Island area that they may hire non-Union bands without interference from the Union and to publish such advice on the full back page of the

Union publication "Allegro" for Six (6) consecutive issues. It is certainly a case of utilizing a sledgehammer to kill the fly.

We have here not a question of different conclusions being drawn from facts, but rather a complete lack of substantial or credible evidence to support the Board's decision and order. Universal Camera Corp. v. NLRB, supra at 488-490.

For all of the foregoing reasons, it is respectfully submitted that this Court enter an order

1. denying enforcement of the Board's June 30, 1976 order issued against Local 802; or alternatively,
2. modifying and limiting the Board's overbroad and improper June 30, 1976 order; and
3. for such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

HAROLD F. LEVIN

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

-against-

ASSOCIATED MUSICIANS OF GREATER NEW YORK,
LOCAL 802, AMERICAN FEDERATION OF
MUSICIANS, AFL-CIO,

Respondent.

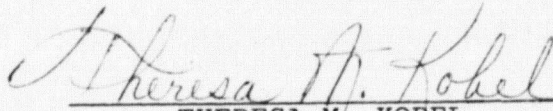
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AFFIDAVIT OF
SERVICE BY
MAIL

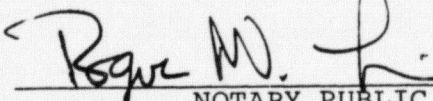
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

THERESA M. KOBEL, being duly sworn, deposes and says:
deponent is not a party to the action, is over 18 years of age and
resides at 248-46 88th Drive, Bellerose, New York 11426. On the
29th day of April, 1977, deponent served the within Brief for Res-
pondent Associated Musicians of Greater New York, Local 802, American
Federation of Musicians, AFL-CIO, upon the Clerk of the United States
Court of Appeals for the Second Circuit, United States Courthouse,
Foley Square, New York, New York 10007; National Labor Relations
Board, Washington, D.C. 20570, Attn. John H. Ferguson and Howard F.
Fine, Esqs.; Samuel M. Kaynard, Regional Director, Region 29, National
Labor Relations Board, 16 Court Street, Brooklyn, New York 11201;
National Association of Orchestra Leaders, Attn. Mr. Charles Peterson,

34 Metropolitan Oval, Bronx, New York 10462; Godfrey P. Schmidt, Esq., 654 Madison Avenue, New York, New York 10022; Huntington Town House, Inc., 124 East Jericho Turnpike, Huntington, New York 11743; Bob Chevy Orchestras, 1792 Flatbush Avenue, Brooklyn, New York 11210; Vogue Restaurant, Inc., Skyway Hotel, 132-10 Conduit Avenue, Jamaica, New York 11430; Queens Center Merchants Association, Inc., 90-15 Queens Boulevard, Rego Park, New York, the addresses designated by said attorneys, parties and the Clerk of the Court for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


THERESA M. KOBEL

Sworn to before me this
29th day of April, 1977.


NOTARY PUBLIC

ROGER M. LEVIN
NOTARY PUBLIC, State of New York
No. 31-7509295
Qualified in New York County
Commission Expires March 30, 1977